Impossibility and *Force Majeure in the Time of Covid 19 Virus*

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Some contracting parties, who find themselves unable to perform their contracts due to circumstances arising from the Coronavirus pandemic, may be able to excuse their performance under the legal doctrine of Impossibility. "When performance of a contract is deemed [legally] impossible it is a nullity," *Transatlantic Financing Corporation v. United States*, 363 F.2d 312, 124 U.S. App. D.C. 183 (D.C. Cir. 1966), which "excuses future performance by **both parties**." *Paddock v. Mason*, 187 Va. 809, 48 S.E.2d 199 (1948). To the extent that either party has previously performed under the contract, that party is entitled compensation for the value of that performance on the basis of *quantum meruit* or to "restitution for any benefit that they have conferred on the other party by way of part performance or reliance." *Transatlantic*. It is critical to note that "no case … holds that a party whose non-performance has been excused thereby may use the doctrine as a sword to compel the other party to accept performance different from that agreed upon." *Paddock*. Where a contract has been deemed legally impossible, a court should seek to put the parties in as near a position as they were before execution of the contract as possible. Where a tenant finds himself excused from the terms of his lease under the Impossibility doctrine, he may be excused from paying the balance of the lease after vacating the property, but his landlord will be entitled to possession of the property, and will be entitled to rent, on a *quantum meruit* or a month to month basis, for the entire time the tenant remains in possession, and will be entitled to reasonable compensation for damage done by the tenant. Likewise, the customers of a purveyor of goods or services, who has accepted payment in advance for such services, will be entitled to restitution of those funds if it is deemed legally impossible for the contractor to supply those goods and services, or to supply them in a commercially reasonable period, subject to due allowance for any value already conferred by the contractor on those customers by way of part performance.

Virginia recognizes the contract doctrine of Impossibility, otherwise known as Impracticability. In the context of the sale of goods, This doctrine is stated in Virginia's version of the Uniform Commercial Code (UCC), which provides that Impossibility, such as to excuse performance of a contract, arises upon "occurrence of a contingency the non-occurrence of which was a basic assumption upon which the contract was made." Va. Code §8.2-615(a).

Virginia recognizes the doctrine with respect to other types of contracts as well. As the Virginia Supreme Court noted in 1944, "[i]t is fairly well settled that where impossibility is due to domestic law, to the death or illness of one by the terms of the contract was to do an act requiring his personal performance, or to the to the fortuitous destruction or change in character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility is due to his fault." *Housing Auth. v. E. Tenn., Etc., Co.*, 183 Va. 64, 31 S.E.2d 273 (1944).

The Court went on to note that "classification has been frequently allowed in recent years, that is, impossibility due to the failure or non-existence of a certain state of affairs or means of performance, the continued existence of which was contemplated by both parties as the basis of their contract, but not contracted for," and further that "[w]here from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the

performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified." *Housing Auth. v. E. Tenn., Etc., Co.*

The Court reaffirmed this position in 1994, 2016 and 2018, stating that "[t]he defense of impossibility of performance is an established principle of contract law. In Virginia, it is 'well settled that where impossibility is due ... to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault.'" *Long Signature Homes, Inc. v. Fairfield Woods, Inc*., 445 S.E.2d 489, 248 Va. 95 (1994); *Hampton Roads Bankshares, Inc. v. Harvard*, 291 Va. 42, 781 S.E.2d 172 (2016); *RECP IV WG Land Investors LLC v. Capital One Bank (USA), N.A*., 811 S.E.2d 817, 295 Va. 268 (2018).

The basic rule for the application of the Impossibility Doctrine in Virginia was set forth in 1919: "First, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative … both parties are discharged from further performance of the contract." *Va. Iron. Coal & Coke Co v. Graham*, 124 Va. 692, 98 S.E. 659 (1919).

Restated in more contemporary language, the rule is thus: "[A] party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable," *Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987), and the risk of loss due to the arising of the contingency rendering the contract impossible "must not have been allocated [among the parties] by agreement or by custom." *Transatlantic*. The party asserting Impossibility bears the burden of proof. *Paddock*.

In applying this rule to particular facts, the following considerations apply:

First, the extent to which the contingency rendering performance impossible was foreseeable by the parties should be considered. Where such contingency was not reasonably foreseeable, the Impossibility Doctrine may apply. On the other hand, the defense may not be available to the extent "the party has reason to know of facts which might cause impossibility" ahead of time. *Vollmar v. CSX Transp., Inc*., 705 F.Supp. 1154 (E.D. Va. 1989). However, the mere fact that the contingency may have been foreseeable, "or even recognized," does not *necessarily* render the Impossibility Doctrine inapplicable; *Transatlantic*. It must at the least, however have been *unexpected*. *Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987). Thus, in evaluating a defense of Impossibility, a court should consider both the extent to which a contingency was *reasonably foreseeable*, and if foreseeable or foreseen, *how likely it was*, in the view of the parties, that the contingency might actually come to pass.

Second, an Impossibility defense is generally limited to those situations where "the event which causes the impossibility is of such a character that it cannot *reasonably* be supposed to have been in the contemplation of the contracting parties when the contract was made." *Va. Iron. Coal & Coke Co* (emphasis added).

Third, the extent of the burden imposed upon the parties by the arising of the contingency should be considered. It is not sufficient that the contingency render performance "merely difficult or burdensome or unprofitable." *Ballou v. Basic Construction Company*, 407 F.2d 1137 (4th Cir. 1969), citing *Lehigh Portland Cement Co. v. Virginia S.S. Co*., 132 Va. 257, 111 S.E. 104, 108 (1922). Rather, "[a] thing is impossible in

legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an **excessive** and **unreasonable** cost." *Transatlantic* (emphasis added).

Subject to the foregoing considerations, legal Impossibility may arise from a variety of circumstances, such as:

- "[A] government's action [that] renders a party's performance of a contractual duty impossible," "emanat[ing] from any level of government." *Franconia Two, LP v. Omniguru Systems, Inc*. (Va. Cir. 2011). See also *Hampton Roads, supra*.

- Acts of God, "comprehend[ing] all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent … if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract." *Sanders v. Coleman*, 97 Va. 690, 34 S.E. 621, 47 L.R.A. 581 (1899).

- Illness of a contracting party materially preventing performance of the contract, or such that performance might aggravate said illness or otherwise be detrimental "to the life or health of the parties." *Sanders*.

- Considerations of public safety, where performance of the contract might expose persons to unreasonable risk of injury. See *Opera Co. of Boston, Inc.*

- Changes in law not reasonably within the contemplation of the parties at the time of contracting. See *Vollmar*.

Also subject to the foregoing analysis, the applicability of the Impossibility doctrine is subject to certain important limitations, such as:

- The doctrine may not be applicable when the party asserting had reason to know of its likely applicability prior to execution of the contract. *Franconia Two, LP*.

- A party who brought about the impossibility through his own fault may not assert the doctrine. *Franconia Two, LP; RECP IV WG Land Investors*.

- A party may not assert the doctrine where he or she assumed the risk. *Franconia Two, LP*.

- A party may be barred from asserting the Impossibility doctrine where he could have learned the facts making performance impossible beforehand, but failed through his own negligence to learn them. *Vollmar*.

Force Majeure

Force Majeure is a concept in contract related to, but distinct from, the Impossibility Doctrine. The concept of *Force Majeure* applies when the parties have agreed ahead of time on the allocation of costs arising from a contingency rendering performance impracticable or impossible. Where contracting parties have agreed to a *Force Majeure* term, the term becomes "a contractual expansion of the doctrine of impossibility which 'becomes the law of the case unless it is repugnant to some rule of law or public policy'" which Virginia courts

will enforce. *Reston Recreation Center Associates v. Reston Property Investors Ltd. Partnership*, 384 S.E.2d 607, 238 Va. 419 (1989)